UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

STERICYCLE, INC.,	)		
	)		
Respondent,	)		
	)		
And	)	Case Nos.	04-CA-137660
	)		04-CA-145466
	)		04-CA-158277
TEAMSTERS LOCAL 628	)		04-CA-160621
	)		
Charging Party	)		

RESPONDENT'S REPLY BRIEF

NOW COMES Stericycle, Inc., Respondent herein, and files its Reply Brief to General Counsel's and Charging Party's Answering Briefs as follows:

INTRODUCTION

On November 10, 2016, Administrative Law Judge Michael A. Rosas issued his Decision in the above-styled case. All parties have filed timely exceptions and supporting briefs, as well as answering briefs. Respondent now files its Reply Brief to the General Counsel's and Charging Party's Answering Briefs.

ARGUMENT

As set forth at length in its brief in support of exceptions, Respondent contends that the ALJ erred in finding that Respondent violated §§ 8(a)(1) and (5) of the Act. For the most part, the arguments and contentions raised by the General Counsel and the Charging Party are fully addressed in Respondent's brief in support of exceptions. However, a few contentions do warrant reply by Respondent.

A. The Personal Conduct Policy

The ALJ found that Respondent's policy regarding personal conduct was overly broad and violative of the Act. This policy provides that "Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated." It then sets forth 17 rules of conduct, one of which states: "Engaging in behavior which is harmful to Stericycle's reputation." (GC Exh. 22, p. 30). Respondent contends that, read in context, employees would reasonably understand that the policy was aimed only at malicious and clearly harmful conduct and would not include protected concerted activity. In response, the General Counsel cites *Knauz BMW*, 358 NLRB 1754 (2012) and *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) as supporting the ALJ's finding of a violation. These cases, however, are distinguishable.

In *Knauz BMW*, the rule in question required employees "to be courteous, polite and friendly," and to refrain from being "disrespectful or us[ing] profanity or any other language which injures the image or reputation of the Dealership." The Board found this rule overly broad because "there is nothing in the rule, or anywhere else in the employee handbook, that would reasonably suggest to employees that *employee communications protected by Section 7* of the Act are excluded from the rule's broad reach." 354 NLRB at 1754 (emphasis added). In *Costco*, the rule in question prohibited *electronic communications* "that damage the Company, defame any individual or damage any person's reputation." The Board found that "employees would reasonably conclude that the rule requires them to refrain from engaging in *certain protected communications* (i.e., those that are critical of the Respondent or its agents)." 358 NLRB at 1101 (Emphasis added). Unlike *Knauz* and *Costco*, Respondent's policy says nothing about "employee communications." Rather, it focuses exclusively on "conduct" and "behavior." As the Board pointed out in *Costco*, rules addressing communications are distinguishable from lawful "rules

addressing conduct that is reasonably associated with actions that fall outside the Act's protection, such as conduct that is malicious, abusive, or unlawful." *Id.* Because the rule in question is focused solely on inappropriate conduct, it is lawful.

Further, in *Costco,* the Board cited with approval its prior decision in *Tradesmen International*, 338 NLRB 460, 460-463 (2002), in which the Board found lawful a rule that prohibited statements "detrimental to the company or any of the company's employees." Although this specific rule, viewed in isolation, might have been overly broad, the Board found no violation because "this rule was among a list of 19 rules which prohibited egregious conduct such as 'sabotage and sexual or racial harassment." 358 NLRB at 1101. Here, the personal conduct rule does not address employee communications and is located in the middle of 17 rules prohibiting clearly unlawful conduct such as possession/use of drugs and firearms, theft, gambling, violence, falsifying records, sleeping on the job, and sexual harassment. Thus, even assuming that the rule's reference to harmful conduct, viewed in isolation, could be deemed as potentially encompassing protected activity, the context makes any such reading unreasonable. Respondent requests that this allegation be dismissed.

B. Conflict of Interest Policy

The ALJ found unlawful a conflict of interest policy that prohibited employees from engaging in "an activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management." (GC Exh. 22, p. 33). Respondent contends that the rule only addresses conflicts of interest such as working with a competitor and clearly unethical behavior. The General Counsel, however, again cites *Knauz BMW,* as well as *Sheraton Anchorage,* 362 NLRB No. 123 (2015). *Knauz* is inapposite and unhelpful for the reasons discussed above regarding the personal conduct policy. As for *Sheraton,* although the Board in

that case found a policy prohibiting a "conflict of interest" to be facially unlawful, it is notable that Sheraton actually applied the rule to protected Section 7 activity, thereby indicating that the employer read the policy to include such conduct. When the actual author of a rule reads it to include protected activity, it hardly can be found that employees somehow understand that the rule does not encompass protected activity. Here, the policy has never been applied to protected conduct. In these circumstances, *Sheraton Anchorage* is not dispositive. Respondent further contends that *Sheraton Anchorage* was incorrectly decided for the reasons cited by the dissent and should be overruled. Respondent requests that this allegation be dismissed.

C. Request for Information Regarding Article 23.3.

The ALJ found that Respondent unlawfully refused to furnish the Union with "internal communications and meeting and bargaining notes requested by the Union on September 5 and 18, 2014, relating to the Company's implementation of Article 23.3." (JD 32: 42-44). Respondent contends that it did furnish the Union with internal communications prior to the arbitration hearing and that the bargaining notes were privileged from production.[1] The General Counsel argues that even though the Union's request was made one day after it filed for arbitration, the Union was faced with a deadline in order to preserve its right to arbitrate, and it was requesting the information in order to continue its evaluation of the grievance and whether perhaps to withdraw it. (GC Answering Brief at 35). This argument, however, is contrary to the record.

The Union's grievance was filed on June 2, 2014, and the Step 1 meeting was held on June 5, 2014. (GC Exh. 11). Under the Southampton CBA, Respondent's first-step response was

[1] The Union seems to concede that it was in fact furnished with the pertinent internal communications and that the only issue is the Union's right to Respondent's bargaining notes, as this is the only argument advanced.

due within 3 working days of the Step-1 meeting. Any grievance not resolved at Step 1 automatically advances to Step 2. The CBA sets no time period within which the second-step meeting must be held, but requires that Respondent submit its response within 5 calendar days of this meeting. The Union then has 60 days from its receipt of the second-step response to request arbitration. (GC Exh. 2, p. 3). The record does not reflect when the second-step meeting occurred, but because the Union had 60 days to decide whether to request arbitration, the assertion that it was under some tight deadline is clearly false. The Union sought no extension of time and requested no information from June 2 to September 4, 2014, when it filed for arbitration. Only then did the Union make a request for information. In these circumstances, the General Counsel's suggestion that the Union requested information on September 5 in order to continue its evaluation of the merits of the grievance rings hollow. Its clear purpose was to seek evidence for the arbitration hearing. Respondent requests that this allegation be dismissed.

4. The Request for EBOLA Presentation

The ALJ found that Respondent unlawfully refused to provide the Union with a copy of a power-point presentation made to employees concerning EBOLA waste. Respondent contends that the information requested is not relevant inasmuch as unit employees do not handle Class A medical waste such as EBOLA and the presentation was merely informational, was not related in any fashion to the CBA, and imposed no obligations on employees. Respondent further contends that the Union acted in bad faith by categorically rejecting Respondent's offer to show the presentation to the Union.

The General Counsel cites *Southern California Gas Co.*, 346 NLRB 449 (2006) and *A.S. Abell Co.*, 230 NLRB 1112, 1114 (1977), *enforcement denied*, 624 F.2d 506 (4th Cir. 1980), for

the proposition that employee training programs constitute a mandatory subject of bargaining. [2] Neither decision is on point. In *Southern California Gas,* the employees were jointly represented by two unions, one of which had negotiated a training program with the employer as part of a settlement agreement with a state agency. The joint representative requested information regarding the program negotiated with the other representative. Not surprisingly as both unions jointly represented the same unit, the Board found that the joint representative who was not a party to the settlement agreement was entitled to information regarding a training program *negotiated* by the other joint representative. In *Abell,* the employer offered employees represented by Union A cross-training opportunities in work performed by employees represented by Union B. Union A requested information regarding this training. Again, the Board found that the request related to the actual work performed by the unit employees, as well as specific contract terms. In contrast here, there is no negotiated training program and this presentation constituted "training" only in the loosest sense of that term. As noted, unit employees do not handle EBOLA and the information was presented because of public hysteria at the time surrounding EBOLA. (Tr. 227-230; GC Exh. 18, pp. 1-2). Even if this information was presumptively relevant, Respondent sufficiently rebutted the presumption.

The General Counsel also contends that Respondent's offer for the Union to view the presentation was inadequate. The cases cited by the General Counsel are all distinguishable. In *Union Switch & Signal, Inc.,* 316 NLRB 1025, 1032-1033 (1995), a unit employee was terminated for alleged respiratory problems that could not be accommodated in connection with air quality issues. The union filed a grievance and requested a copy of a previously-performed air

[2] The General Counsel also cites *Hospital of Bartow, Inc.,* 361 NLRB No. 34 (2014), *enforcement denied on other grounds,* 820 F.3d 440 (D.C. Cir. 2016), but this case is addressed in Respondent's brief in support of exceptions.

quality study in order to assess the employer's position that no accommodation was possible. The employer offered to permit the union to review the study and take notes. The union accepted this offer without waiving its right to seek the entire study. At the hearing before the ALJ, it became clear that the union's notes were inadequate, particularly given that the study included 12 pages of tabulations. In these circumstances, the Board found the employer's offer to be insufficient. In *Laidlaw Waste Systems, Inc.*, 307 NLRB 1211, 1214 (1992), the union requested certain information in a grievance meeting regarding the termination of two employees for failing a physical exam, one employee for a safety violation, and another employee for falsifying his employment information. It is not entirely clear as to the scope of the information requested, but it included the physical exam results, a copy of the safety rule allegedly violated, and certain other file materials relied upon by the employer. The employer read aloud portions of its files, but never provided the requested information. The Board found that this was an inadequate substitute for providing the requested documents. In *American Telephone & Telegraph Co.*, 250 NLRB 47 (1980), *enf'd*, 644 F.2d 923 (1st Cir. 1981), the information was requested in connection with a specific grievance and consisted of more than 50 pages, including 50 attachments. In these circumstances, the Board found that the employer's offer for the union to hand copy the documents was insufficient to satisfy its bargaining obligation.

Here, there was no grievance pending or contemplated, and the Union's purpose in requesting the information was non-specific. It simply wanted to know what was being shown to employees. This purpose easily could have been satisfied if Dagle had simply agreed to watch the very same presentation that had been shown, but not given, to employees. Dagle, however, categorically refused this offer and stood on his asserted right to receive a copy of anything shown to employees, regardless of content. This is the antithesis of good faith bargaining, and

Dagle's obstinacy precluded any testing of Respondent's good faith. Respondent requests that this allegation be dismissed.

5. Distribution of Morgantown Employee Handbook

Both the General Counsel and the Union cite *United Cerebral Palsy of New York City,* 347 NLRB 603 (2006) as support for the ALJ's finding that Respondent unlawfully unilaterally changed terms and conditions of employment at Morgantown by distributing an employee handbook containing provisions that were inconsistent with the Morgantown CBA. However, there is a critical distinction between that case and the instant one. In *United Cerebral Palsy*, the respondent did not dispute that it actually implemented the policies set forth in the handbook. Its sole contention was that the relevant provisions did not constitute mandatory subjects of bargaining. *Id.* at 612. Thus, there was no question that the policies were actually "implemented." Here, in contrast, the allegedly offending policies were never implemented, and the General Counsel does not contend otherwise. Absent actual implementation of a unilateral change, the complaint allegation fails and should be dismissed.

6. The Nationwide Remedy

As discussed in Respondent's brief in support of exceptions, the General Counsel's complaint did *not* allege that the employee handbook or any of the allegedly offending policies were implemented nationwide or at any location other than Morgantown. Nowhere in the complaint is there any statement or allegation that the General Counsel was requesting a nationwide remedy. In these circumstances, it would violate Respondent's Due Process rights for the Board to impose a nationwide remedy.

Further, the sole evidence presented by the General Counsel regarding the geographic scope of the handbook was a training roster sheet reflecting dissemination at Morgantown. (GC

Exh. 32). In its answering brief, the General Counsel cites to certain testimony from Labor Relations Manager Carol Fox on cross examination by the Charging Party's counsel. The question posed to Fox was whether she was aware "that handbooks were given out by the Employer to all employees across the country, correct, the new employees?" Fox responded, "To new hires as they come on board." (Tr. 327). This testimony is vague and patently insufficient to establish nationwide implementation of the handbook that was introduced into the record and disseminated at Morgantown. Counsel's question referred to "handbooks" generally, not the Morgantown handbook that was introduced into evidence, and Fox's response merely suggests a general practice of distributing handbooks to new hires. Fox was not asked whether the handbook in issue was distributed at any other location, nor did the question posed provide any time frame. Remember that the handbook in dispute came about when Union representative Dagle requested a copy of the 2014 handbook that was in place at Morgantown, and Respondent discovered that no handbooks had been distributed at either Morgantown or Southampton for years. As a result, Respondent advised Dagle of this fact and told him that a new 2015 handbook was being distributed at these two locations. (GC Exh. 21). In fact, however, it is undisputed that the new handbook was not distributed at Southampton. (Tr. 110). Thus, the record fails to establish that any offending policy was distributed at any location other than Morgantown. All that the Board is left with is surmise and speculation.

Respondent requests that the proposed nationwide remedy be rejected.

CONCLUSION

Respondent respectfully requests that the Second Consolidated Complaint, as amended, be dismissed in its entirety.

Dated this 3rd day of February 2017

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing REPLY BRIEF by electronic mail on the following parties:

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This the 3rd day of February 2017.

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